Tan Sri Khoo Teck Puat & Anor v Plenitude Holdings Sdn Bhd

SUPREME COURT (KUALA LUMPUR) — CIVIL APPEAL NO 02-281-92
ABDUL HAMID OMAR LP, GUNN CHIT TUAN CJ (MALAYA) AND EUSOFF CHIN SCJ
23 FEBRUARY 1993

Civil Procedure *— Appeal — Facts, finding of — Interference by appellate court — Principles applied*

The second appellant had agreed to sell to the respondent an estate land at the price of RM47, 939,958. The respondent paid a deposit of 10% amounting to RM4,793.80 but failed to pay the balance purchase price within the contractual period. The second appellant then terminated the agreement and forfeited the deposit. The respondent brought an action against the appellants. One of the issues raised in the court below was whether the second appellant and Tan Sri Khoo Teck Puat ('the first appellant'), in order to induce the respondent to enter into the sale and purchase agreement, had represented orally to the respondent that the appellants will undertake to obtain a loan for the respondent, to enable it to complete the sale and purchase of the said estate land free of encumbrances and with vacant possession, and that if the loan could not be obtained, the second appellant would enter into a joint venture with the respondent to develop the said estate land. The learned trial judge concluded that on the evidence, the respondent had proved that the first appellant had made the alleged representations. The learned judge in his grounds of judgment, stated that the respondent, with a paid up capital of RM5m, was unlikely to have agreed to the terms of the sale and purchase agreement unless the first appellant had unequivocally given an oral undertaking to secure a loan for the respondent. The learned judge also considered that it was in the appellants' interest for the respondent to secure the loan for in such event, the appellants could complete the sale of the land at a price substantial enough to benefit the appellants. His Lordship also found that there were serious doubts as to the credibility of the first appellant. (See [1992] 2 MLJ 68.) Another issue raised was whether the notice of termination issued by the second appellant's solicitors to the respondent was valid and proper. The learned judge held in the circumstances that the notice was not a reasonable notice and the termination of the agreement was unlawful. The appellants appealed.

Held, dismissing the appeal:

(1) There was no misdirection of himself by the learned judge and the appeal court was not disposed to come to a different conclusion on the printed evidence in the appeal records as it did not have the advantage enjoyed by the trial judge of having seen and heard the witnesses.

(2) Having reviewed the case as a whole and having considered the arguments of counsel on both sides, the appeal court was not prepared to disagree with the learned judge on his findings of fact based on the evidence adduced and found no reason for interfering with his judgment.

(3) The appeal was dismissed with costs and it was ordered that the balance of the purchase money be paid by the respondent to the appellants within six months from the date of judgment.

[Bahasa Malaysia summary

Perayu kedua telah bersetuju menjual kepada penentang sebidang tanah estet dengan harga RM47,939,958. Penentang telah membayar deposit 10% berjumlah RM4,793,955.80 tetapi telah gagal membayar baki harga pembelian dalam tempoh kontraktual itu. Perayu kedua kemudiannya telah menamatkan perjanjian itu dan melucuthak deposit itu. Penentang telah membawa tindakan terhadap perayu. Satu isu yang ditimbulkan di mahkamah yang lebih rendah adalah sama ada perayu kedua dan Tan Sri Khoo Teck Puat ('perayu pertama'), dengan tujuan mendorong penentang mengikat perjanjian jual-beli itu, telah membuat representasi lisan kepada penentang bahawa mereka berakujanji akan memperolehi satu pinjaman untuk membolehkan penentang menyelesaikan hal jual-beli tanah estet itu bebas dari bebanan dan dengan milikan kosong, dan jika pinjaman itu tidak dapat diperolehi, perayu kedua akan memasuki satu usaha sama dengan penentang untuk memajukan tanah estet itu. Hakim yang arif telah membuat kesimpulan bahawa atas keterangan, penentang telah membuktikan bahawa perayu pertama telah membuat representasi itu. Di dalam alasan penghakimannya hakim yang arif telah menyatakan bahawa penentang, dengan modal dibayar sebanyak RM5 juta, tidak mungkin bersetuju dengan terma-terma perjanjian jual-beli itu kecuali perayu pertama telah dengan jelas memberi akujanji lisan akan mendapatkan pinjaman itu untuk penentang. Hakim yang arif juga berpendapat bahawa adalah bagi kepentingan perayu jika penentang mendapat pinjaman itu kerana jika itu berlaku, perayu boleh menyelesaikan penjualan tanah itu dengan harga yang cukup substansial supaya menguntungkan perayu. Hakim yang arif juga mendapati bahawa terdapat keraguan yang serius tentang kebolehpercayaan perayu pertama. (Lihat [1992] 2 MLJ 68.) Satu lagi isu yang ditimbulkan adalah sama ada notis penamatan yang diberi oleh peguambela perayu kedua kepada penentang adalah sah dan wajar. Hakim yang arif memutuskan bahawa dalam keadaan kes ini, notis itu bukan notis yang munasabah dan penamatan perjanjian itu tidak sah. Perayu telah membuat rayuan.

Diputuskan, menolak rayuan itu:

(1) Tidak terdapat penyalaharahan oleh hakim yang arif dan mahkamah rayuan tidak berasa terdorong untuk membuat kesimpulan yang lain atas keterangan yang tercatat di dalam rekod rayuan

oleh kerana ia tidak mempunyai faedah yang ada pada hakim perbicaraan yang dapat melihat dan mendengar saksi-saksi.

(2) Selepas mengkaji semula kes itu seluruhnya dan selepas menimbangkan hujah peguambela kedua-dua pihak, mahkamah rayuan tidak bersedia bertentangan pendapat dengan hakim yang arif atas pendapat faktanya berdasarkan keterangan yang diberi dan tidak terdapat sebab untuk mengganggu penghakiman beliau.

(3) Rayuan itu ditolak dengan kos dan diperintahkan supaya baki harga pembelian tanah itu dibayar oleh penentang kepada perayu dalam tempoh enam bulan dari tarikh penghakiman ini.]

Notes

For cases on interference by appellate court on findings of fact, see 2 *Mallal's Digest* (4th Ed) paras 237–239.

Cases referred to

1 *Tay Kheng Hong v Heap Moh Steamship Co Ltd* [1964] MLJ 87 (refd)

2 *Chew Boon Ee v L Ramanathan Chettiar & Ors* [1959] MLJ 235 (refd)

Appeal from: Civil Suit No 22–32–1989 (High Court, Johore Bahru)

P Royan (*Robert Lai Poh Fye* and *Ng Thian Woon* with him) (*Jackson & Masacorale*) for the appellants.

Wong Kim Fatt (*M Pathmarajah* with him) (*Gulam & Wong*) for the respondent.

Gunn Chit Tuan CJ (Malaya) (delivering the grounds of judgment of the court): By a sale and purchase agreement dated 20 August 1984 (p 275 of the appeal records), Rumah Nanas Rubber Estate Sdn Bhd ('the second appellant') agreed to sell to Plenitude Holdings Sdn Bhd ('the respondent') an estate land at the price of RM47,939,958. The respondent paid a deposit of 10% amounting to RM4,793,995.80 but failed to pay the balance purchase price within the contractual period of six months or within the extended completion periods. The second appellant then terminated the said agreement and forfeited the said deposit by a letter dated 12 December 1988 (p 309 of the appeal records).

One of the issues raised in the court below was whether the second appellant and Tan Sri Khoo Teck Puat ('the first appellant'), in order to induce the respondent to enter into the said sale and purchase agreement, had represented orally to the respondent that the appellants undertake to obtain a loan from the National Bank of Brunei or another source for the respondent, to enable it to complete the sale and purchase of the said estate land, free of encumbrances and with vacant possession, and that if the loan could not be obtained, the second appellant would enter into a joint venture with the respondent to develop the said estate land.

The learned trial judge concluded that on the evidence, the respondent had proved that the first appellant, who was DW1 in the court below, had made the alleged representations and gave three reasons for arriving at his conclusion. The learned judge in his grounds of judgment stated that the respondent, with a paid up capital of RM5m, was unlikely to have agreed to the terms of the sale and purchase agreement unless the first appellant had unequivocally given an oral undertaking to secure a loan for the respondent. The learned judge also considered that it was in the appellants' interest for the respondent to secure the loan for in such event, the appellants could complete the sale of the land at a price substantial enough to benefit the appellants. His Lordship also found that there were serious doubts as to the credibility of the first appellant. [See [1992] 2 MLJ 68.]

On appeal to the Supreme Court, it was contended that despite the learned judge's declaration that he had considered the contemporaneous documentary evidence, his Lordship did not refer to any of the relevant correspondent appearing between pp 289–355 of the appeal records and that when tested against those contemporaneous documents and the overall probabilities, it was not likely that any of the alleged representations were made by the first appellant. It is true that the learned judge did not refer individually to those letters but in his judgment (p 52 of the appeal records) his Lordship did state as follows:

> On the evidence, both oral and on the contemporaneous documentary evidence, I can only conclude as a fact that the plaintiffs have proven on a balance of probabilities that DW1 had promised to secure a loan for the plaintiffs and that in the event that such a loan could not be secured he had given an undertaking to join the plaintiffs in a joint venture scheme to develop the said land.

On this issue of fact, we note that the learned judge had considered and accepted the oral evidence of one Yap Chui Kui (PW1) and had rejected the evidence of the first appellant, who was DW1, especially in the light of glaring contradictions by the first appellant in respect of his resident director, one Encik Sohaimi (p 240 of the appeal records) who was not called as a witness by the defence.

Another issue raised was whether the notice of termination dated 12 December 1988 issued by the second appellant's solicitors to the respondent was valid and proper. The learned judge held that the said notice was not a reasonable notice and that the contract was never legally terminated. It was again the contention of the appellants that the judge had not considered the relevant contemporaneous evidence appearing between pp 301–388 of the appeal records. It was contended that the agreement had lapsed and that if the respondent wanted to purchase the land, it was subject to new terms. It was also contended that the respondent's inability to complete the purchase of the said land entitled the second appellant to terminate the agreement.

On the other hand it was contended by the respondent that the letter of 12 December 1988 (p 309 of the records) gave absolutely no notice whatsoever to the respondent. The appellants had waived their rights and time was no longer the essence of the contract after 3½ years. Counsel for the respondent contended that the learned judge was right in holding that

A the termination of the agreement was unlawful and that the learned judge had considered this issue very carefully in the light of evidence and authorities before him (pp 56–63 of the appeal records) and that the learned judge also repeated his findings in his grounds of judgment as follows (p 84 of the appeal records):

B > Again at the risk of repetition I would say that since the plaintiffs were unable to raise a loan either on their own volition or by the default of the first defendant company, time no longer constituted the essence of the contract, as evident by the negotiations that continued between the parties. If the defendants had considered time of the essence they ought to have given a reasonable notice of their intention to abandon the contract if the balance of the purchase price was
C > not paid. (See *Webb v Hughes* (1870) LR 10 Eq 281; *Stickney v Keeble & Anor* [1915] AC 386.) The plaintiffs as can be seen from the evidence never abandoned the agreement expressly or impliedly.

As regards the principles on which an appellate court may interfere with a lower court's findings of fact we would refer to the following passage in the
D judgment of Lord Guest in *Tay Kheng Hong v Heap Moh Steamship Co Ltd*[1] in which his Lordship stated as follows:

> There is a heavy onus on a party who seeks to displace the conclusion formed by the trial judge on questions of fact. The principles upon which an appellate court should act in reviewing the decision of a judge of first instance were stated by Lord Thankerton in *Watt or Thomas v Thomas* [1947] 1 All ER 582 at p 587:

E > I Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be
F > sufficient to explain or justify the trial judge's conclusion.
>
> II The appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence.
>
> III The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen
G > and heard the witnesses, and the matter will then become at large for the appellate court.

> Later his Lordship quoted with approval a passage from the speech of Lord Shaw in *Clarke v Edinburgh & District Tramways Co Ltd* [1919] SC (HL) 35 at p 37:

H > 'In my opinion, the duty of an appellate court in those circumstances is for each judge of it to put to himself, as I now do in this case, the question, Am I — who sit here without those advantages, sometimes broad and sometimes subtle, which are the privilege of the judge who heard and tried the case — in a position, not having those privileges, to come to a clear conclusion that the judge who had them was plainly wrong? If I cannot be satisfied in my own mind that the judge with those privileges was plainly wrong, then it appears to me to be my duty to
I > defer to his judgment.'

Applying the above principles in reviewing the decision of the court of first instance in this case, we did not find any misdirection of himself by the learned judge and we ourselves are not disposed to come to a different

conclusion on the printed evidence in the appeal records as we do not have the advantage enjoyed by the trial judge of having seen and heard the witnesses. We were satisfied from the printed evidence that the trial judge's conclusions are justified having put to ourselves the question whether sitting without the privilege of the trial judge who heard and tried the case, could we come to the conclusion that the learned judge, who saw and heard the witnesses, was plainly wrong? As we could not come to that conclusion, it is therefore our duty to defer to his judgment.

Having reviewed this case as a whole and having considered the arguments of counsel on both sides, we were not prepared to disagree with the learned judge on his findings of facts based on the evidence adduced and found no reason for interfering with his judgment (*Chew Boon Ee v L Ramanathan Chettiar & Ors*[2]).

The appeal was therefore dismissed with costs and we also ordered the balance of the purchase price to be paid by the respondent to the appellants within six months from the date hereof.

Appeal dismissed.

Reported by Prof Ahmad Ibrahim